IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NUMBER DA-09-0677

RANDALL M. QUAM,

Plaintiff/Appellant,

v.

JAMES R. HALVERSON,

Defendant/Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court
of the Eighteenth Judicial District,
Cause No. DV-09-249B

APPEARANCES:

Martin R. Studer, Esq.
Attorney at Law
638 Ferguson Avenue, Suite 1
Bozeman, MT 59718
(406) 587-5022
email: studer@bresnan.net
Attorney for Plaintiff/Appellee

Allan H. Baris, Esq.
Moore, O'Connell & Refling, P.C.
P.O. Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
email: morlaw@qwestoffice.net
Attorneys for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes/Other Authorities

ISSUES PRESENTED

1. Whether the Amended Complaint alleged facts that stated a cause of action for violation of § 50-16-536(1), MCA.
2. Whether there exists a separate cause of action for a violation of Mont. R. Civ. P. 45(b)(1).
3. Whether the Amended Complaint stated a cause of action for violation of a constitutional right to privacy.
4. Whether the District Court correctly concluded that compliance or noncompliance with § 50-16-536(2), MCA, was not an issue raised in the Amended Complaint.

STATEMENT OF THE CASE

On March 18, 2009, Appellant Randall M. Quam ("Quam") filed a Complaint against Appellee James R. Halverson ("Halverson"). At that time, Halverson was the attorney for the defendant in another lawsuit filed by Quam. Quam alleged that a subpoena Halverson had served seeking Quam's medical records did not comply with the requirements of Civil Rule 45 and § 50-16-536(1), MCA, and therefore violated his constitutional right to privacy. Eight days later, Quam filed an Amended Complaint that was essentially an edited version of the Complaint.

Halverson filed a Civil Rule 12(b)(6) Motion to Dismiss because a violation of Civil Rule 45 has never been recognized as a basis for a separate cause of action and because, even assuming all the allegations of the Amended Complaint to be true, there was no violation of § 50-16-536(1), MCA. When Quam responded to Halverson's Motion to Dismiss, he also moved for partial summary judgment on liability. Quam never filed a motion to allow a second amendment to his complaint. After conducting a hearing on the cross-motions and considering post-hearing briefs, the District Court denied Quam's Motion for Partial Summary Judgment and granted Halverson's Motion to Dismiss.

Quam filed a timely appeal from the Notice of Entry of Judgment.

STATEMENT OF FACTS

This matter comes before the Court on an Order granting a Civil Rule 12(b)(6) motion to dismiss and denying a Civil Rule 56 motion for partial summary judgment. [CR 40] For purposes of the Rule 12(b)(6) motion only, the well pleaded facts of the Amended Complaint are taken as true.[1] Therefore, it is assumed to be true that Halverson served the subpoena

[1]For his motion for partial summary judgment, Quam was not entitled to the same presumption.

without serving a copy of it on Quam's counsel. [CR 3, ¶ 5] Likewise, it is assumed that Halverson did not give Quam or his counsel ten days' written notice of his intention to obtain these medical records. [*Id.*] Quam's Amended Complaint explicitly alleges that his medical records were obtained as part of discovery in a lawsuit for bodily injuries. [CR 13, ¶¶ 2-7] That case was *Quam v. Sebena*, Eighteenth Judicial District Court, Gallatin County, Cause No. DV-08-530B (hereinafter "*Sebena*"). [CR 13, ¶¶ 2-7] Obtaining the medical records of a plaintiff in a personal injury lawsuit is not one of the limited circumstances under which § 50-16-536(1), MCA, requires a ten day notice.

Halverson supplied a copy of the medical records to Quam's counsel. [CR 13 at 5 and Exhibits 4, 5] Quam's counsel attached the subpoena and the medical records that had been produced as exhibits to his original complaint. [CR 1][2]

Halverson filed a Civil Rule 12(b)(6) motion to dismiss the Amended Complaint on the grounds that: (1) there was no recognized cause of action

---

[2]After it was pointed out to Quam's counsel that he had filed Quam's medical records without redacting such information as Social Security numbers and birth dates, as required by Public Access Rule 4.50, Quam moved to have the court file sealed, which the District Court granted. [CR 5,6]

for any violation of Civil Rule 45, and (2) as a matter of law, there was no violation of § 50-16-536(1), MCA. [CR 7, 8] Without a legal cause of action for violation of Civil Rule 45 and with no violation of the statute alleged in the Amended Complaint, there was no basis for any relief alleged in the Amended Complaint.

Together with his opposition to Halverson's motion to dismiss, Quam requested partial summary judgment to establish liability. The motion for summary judgment, brief in support of the motion for summary judgment, and the opposition to Halverson's motion to dismiss were contained in a single document. [CR 13] The Case Register demonstrates that Quam never filed a motion for leave to file a second amended complaint. Quam essentially conceded in his brief that there had been no violation of § 50-16-536(1), MCA, as alleged, by Quam. [CR 13 at 4-5] Instead, Quam believed the facts established that there had been a violation of § 50-16-536(2), MCA. [CR 13 at 13]

Quam acknowledged that his Amended Complaint did not allege a violation of subsection (2). Quam suggested that if the Court felt such an allegation was needed, the Court should allow him to amend his complaint again. [*Id.* at 6, 13-14] No pleading identified as a motion to amend was

filed, no proposed (second) amended complaint was filed, and no brief in support of the motion (as required by Unif. Dist. Ct. Rule 2(a)) was filed.

The District Court held a hearing on Halverson's and Quam's motions on October 22, 2009. On October 23, 2009, the District Court issued an Order requesting additional briefing on whether Montana recognizes a cause of action for damages against a private citizen for the violation of a constitutional right of privacy. [CR 37] That same day, Quam filed a supplemental brief on that issue and Halverson filed his supplemental brief November 12, 2009. [CR 38, 39]

On November 25, 2009, the District Court entered its Decision and Order denying Plaintiff's motion for summary judgment and granting Halverson's motion to dismiss. [CR 40] The Amended Complaint was dismissed without prejudice with respect to the alleged violation of § 50-16-536(1), MCA, and with prejudice with respect to the alleged violation of Civil Rule 45 and any claim for an alleged violation of the constitutional right of privacy.

Halverson asks this Court to take judicial notice of the District Court's Decision and Order dated July 14, 2009, in *Sebena* attached as Appendix A. In that Order, the same judge who presided over this case

addressed the deficiencies with the subpoena to Dr. Campbell and also ruled that Dr. Campbell's medical records were discoverable in that case. Attached as Appendix B to the Appendix is the Order dismissing the *Sebena* case with prejudice making the Decision and Order of July 14, 2009 final. Courts, including this Court, take judicial notice of law, including the records of any courts of this state, when asked to do so and provided with the appropriate information. Mont. R. Evid. 202 and 101. See *Clouse v. Lewis and Clark Co.*, 2008 MT 271, ¶ 58, 345 Mont. 208, 190 P.3d 1052. Although the District Court in its Order dismissing Quam's Amended Complaint did not explicitly state that it had taken judicial notice of its own Order in the related case, both parties referred the District Court to the contents of the *Quam v. Sebena* court file. [See, e.g., CR 8 at 2, CR 13 at 5-8, TR 35-37] Matters of public record can be considered by the District Court in ruling on a Civil Rule 12(b)(6) motion to dismiss. *Stillman v. Fergus Co.*, 220 Mont. 315, 316, 715 P.2d 43 (1986).

STANDARDS OF REVIEW

Halverson accepts Quam's discussion of the standards of review as accurate statements of the law.

SUMMARY OF ARGUMENT

This case presents an example of inappropriate litigation gamesmanship that the District Court appropriately dismissed for failure to state a cause of action. When the attorney (Halverson) representing Quam's opponent in a personal injury case served a subpoena for medical records without providing Quam's attorney prior notice, Quam sued his opponent's attorney claiming a violation of Mont. R. Civ. P. 45, § 50-16-536(1), MCA, and the constitutional right to privacy. He did so while his personal injury case was pending and while the judge in that case was considering a motion for protective order filed by Quam. His Summons and Complaint were served together with written discovery requesting information and documents from his opponent's litigation file.

After granting Halverson's motion to stay discovery and conducting a hearing on Halverson's motion to dismiss and Quam's motion for summary judgment, the District Court dismissed Quam's suit. Each of the District Court's reasons is correct. First, as a matter of law there was no violation of § 50-16-536(1), because the statute does not apply to a subpoena issued from a personal injury lawsuit. Quam's attempt to switch legal theories to claim a violation of § 50-16-536(2) was properly disallowed because that

statute was never pleaded and no facts were alleged in Quam's Amended Complaint that related to subsection (2).

Second, the violation of a civil discovery rule is not a matter that creates a collateral cause of action against an opposing party's attorney. It is a matter to be dealt with in the litigation where the infraction occurred. In fact, the judge in the personal injury case did review and deal with the deficient subpoena.

Third, there is no cause of action for a violation of a constitutional right to privacy against a private citizen. A private attorney is not a state actor so Halverson is not subject to a constitutional privacy claim. In addition, the procedural deficiencies alleged by Quam do not infringe his privacy. Regardless whether the procedure was correct, the records were required to be produced in the other lawsuit and were voluntarily filed as a public document in this case.

Finally, because Quam's Amended Complaint failed to state a cause of action, his motion for summary judgment was moot. Furthermore, Quam submitted no competent evidence to support his motion for summary judgment.

ARGUMENT

1. The District Court Correctly Ruled that Halverson did not Violate § 50-16-536(1), MCA.

The Amended Complaint unequivocally alleges a violation of § 50-16-536(1), MCA, based on the fact that no separate written notice was provided to Quam or his counsel ten days prior to issuing the subpoena. [Amended Complaint, ¶ 6] Section 50-16-536(1), MCA, provides:

> Unless the court for good cause shown determines that the notification should be waived or modified, if health care information is sought under 50- 16-535(1)(b), (1)(d), or (1)(e) or in a civil proceeding or investigation under 50-16-535(1)(j), the person seeking discovery or compulsory process shall mail a notice by first-class mail to the patient or the patient's attorney of record of the compulsory process or discovery request at least 10 days before presenting the certificate required under subsection (2) of this section to the health care provider.

The plain language of § 50-16-536(1), MCA, requires a ten day written notice of a subpoena to be provided to a patient or patient's attorney under circumstances which fall within any one of four subsections of 50-16-536(1). Section 50-16-535(1), MCA, has a total of eleven subsections, but § 50-16-536(1), MCA, requires the ten day notice only if health care information is sought under four of the eleven subsections. The applicable subsection in this case is § 50-16-535(1)(c), MCA, which applies to records

sought where "the patient is a party to the proceeding and has placed the patient's physical or mental condition in issue . . ." No ten day notice is required under § 50-16-536(1), MCA, for records sought pursuant to subsection (c).

Quam appears to concede that there was no violation of § 50-16-536(1), MCA:

> If discovery is sought pursuant to subsection (b), the discovering party must give ten days notice, but, inexplicably, no notice is required if discovery is sought pursuant to subsection (c). § 50-16-536(1), MCA. While that may appear to create a loophole, and authorize discovery without notice, the discovery of confidential health information by compulsory process is also governed by Rule 45, M.R.Civ.P.,which clearly requires notice[.]

[Appellant's Brief at 9]

As already noted, the fact that no ten day notice is required for records described by subsection (c) is no anomaly. Seven of the eleven subsections of § 50-16-535(1) do not require a ten day notice. Furthermore, although § 536(1) does not explicitly explain the Legislature's reasons for requiring a written ten day notice for the four subsections of § 535(1), there are obvious distinctions between § 535(1)(b) which requires notice and § 535(1)(c) which does not require notice. Subsection (b) deals with records

obtained where "the patient has waived the right to claim confidentiality for health care information sought[.]" Typically, this involves a patient who has signed a medical authorization. By requiring ten days' written notice in that circumstance, § 50-16-536(1), MCA, guards against the possibility that the authorization is stale or is being used to obtain records that were created after the authorization was signed. A ten day notice in such circumstances allows the patient the opportunity to revoke the authorization before the records are released.

In contrast, when the plaintiff has filed a lawsuit and placed his medical conditions at issue, he has impliedly waived his right to claim privacy for use of his related medical records in the personal injury lawsuit. *Hendricksen v. State*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38. Ten days' notice is not needed. Civil Rules 34 and 45 provide the guidelines for the production of those medical records.

Here, there was no authorization or waiver used to obtain the records. Accordingly, subpart (b) has no application. Likewise, subparts (d), (e) or (j) do not apply. Those subsections relate to witnessing the execution of a Will or other document (d), the condition of a deceased patient (e), or where a court has previously made a determination of a compelling state interest

outweighing the patient's privacy concerns (j). Furthermore, in an exercise of caution, the District Court dismissed the Amended Complaint with respect to the allegations concerning § 50-16-536(1) without prejudice so that Quam could re-file a complaint alleging facts that fell within the parameters of one of those four subsections implicated by § 536(1).

After conceding that § 50-16-536(1) has no application in this case, Quam attempts to save that part of his Amended Complaint by arguing that an allegation that Defendant violated § 536(1) is adequate notice that he is actually alleging a violation of § 536(2). In resisting a motion to dismiss under Civil Rule 12(b)(6), a plaintiff is given considerable latitude which allows a plaintiff to take advantage of all reasonable factual inferences from the allegations in a complaint. *Cowan v. Cowan,* 2004 MT 97, 321 Mont. 13, 89 P.3d 6. The rules of pleading, however, are not like a game of horseshoes that allows a plaintiff to allege recovery under one statutory provision and proceed under a different statutory provision requiring a different factual predicate simply because the two statutes are close to each other.

In this case, both the original Complaint and the Amended Complaint explicitly alleged a violation of § 536(1). In addition, the factual

description of the violation expressly alleged a failure to provide ten days' written notice to the Plaintiff or his attorney. [CR 3, ¶ 6] There was neither a citation to § 536(2), nor an allegation of a failure to provide a written designation to the health care provider of the basis for the request for medical records.[3] The District Court, therefore, correctly ruled that because Quam did not allege a violation of § 536(2) in his original Complaint or his Amended Complaint, that Halverson's compliance or noncompliance with that statute was immaterial to Defendant's Rule 12(b)(6) motion to dismiss. [CR 40 at 4-5]

2. The District Court Correctly Ruled that there is no Separate Cause of Action for a Violation of Mont. R. Civ. P. 45(b)(1).

Mont. R. Civ. P. 45 is based on, and is similar to, Rule 45 of the Federal Rules of Civil Procedure. This is true in all but a few states. Despite the many years that the rule has been in existence, and its prevalence throughout the United States, no jurisdiction, state or federal, is known to have recognized a separate cause of action based on a violation of

[3]In this case, the basis for the request for the records was obvious since it came in the form of a subpoena containing a caption of the case showing Quam as a plaintiff.

Rule 45. Instead, violations of Civil Rules in general and of Rule 45 in particular are dealt with in the action in which the subpoena was issued.

At the October 22, 2009 hearing in the District Court, the District Court Judge commented that he and his law clerk had searched for authority recognizing a cause of action for violation of the Civil Rules and had likewise been unable to find any such authority. [TR 14] Quam apparently acknowledges there is no such authority. [Appellant's Brief at 14]

Quam in essence is asking this Court to create a new and novel cause of action. The authorities he cites to support the creation of this new cause of action, provide faint or no support for that result. He first relies on several sections of Title 27, Chapter 1 setting forth general concepts of civil liability and remedies. Several of these statutes have been in place since 1895 and have never been amended. All of the statutes are of considerable vintage. Yet, those statutes have not been utilized to create a new cause of action. Rather, they preserve the rights of parties with respect to recognized causes of action.

The District Court correctly concluded that the Montana Rules of Civil Procedure already provide adequate sanctions and protections for violations of the Civil Rules. See, e.g., Civil Rule 26(c), Mont. R. Civ. P.

("the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ."); Mont. R. Civ. P. 45(c)(1), (3) (allowing both monetary sanctions and quashing of the subpoena). Although motions to quash subpoenas are typically filed before the materials are produced or the witness appears, the only requirement for the motion is that it be timely. [Mont. R. Civ. P. 45(c)(3)(A)] Where a party did not have notice of the subpoena, a motion to quash and require that the offending materials be returned and not used is appropriate if brought within a timely fashion once the facts of the subpoena are learned. See *Mann v. University of Cincinnati*, 824 F.Supp. 1190 (S.D. Ohio 1993), *aff'd*, 114 F.3d 1188 (6th Cir. 1997). That essentially occurred in the *Sebena* case where the subpoena was issued. The Court considered and dealt with the deficiencies in the subpoena. [Appendix A at 29-33] The Court ruled that subpoena did not comply with Civil Rule 45 and that the fruits of the subpoena could not be utilized. However, the Court also ruled that the records that were sought by the subpoena were discoverable and ordered that Quam produce the same records. [*Id.* at 12-13, 19]

Allowing a new cause of action for violation of Rule 45 is especially problematic when, as here, suit is brought while the proceeding from which the subpoena was issued is still pending. To allow such an action would be an invitation for mischief by opposing counsel. If such an action were permitted, the discovery rules would allow broad inquiry by a party in the first case against his or her adversary's attorney. Such discovery inevitably would allow improper peeking into the litigation strategy and tactics of the adverse party. That appears to have been the motive in this case, because Quam served discovery requests with his Complaint. Halverson objected that the discovery should not be had until the *Sebena* case was resolved. Even if Quam had a legitimate cause of action, there was no exigency or good faith reason not to delay discovery in order not to compromise Ms. Sebena's defense. Nonetheless, Quam attempted to aggressively push forward with discovery by requesting the deposition of Halverson and by moving to compel responses to discovery. [CR 14, 17, 19, 20] In order to prevent discovery, Halverson was forced to file a motion to stay discovery, which the trial court granted. [CR 17, 35]

In *Oliver v. Stimson Lumber Co.*, 1999 MT 328, 297 Mont. 336, 993 P.2d 11, in a different context, this Court recognized that it was

inappropriate to have parties to one suit conducting collateral litigation over discovery issues. In *Oliver*, this Court recognized for the first time civil causes of action for negligent spoliation of evidence and intentional spoliation of evidence. However, the Court took pains to limit the scope of those new causes of action to litigation between non-parties. With respect to parties to litigation, this Court stated:

> Remedies already exist for parties to an action who have suffered a loss as a result of the spoliation of evidence by another party. [Citations omitted] We see no reason to recognize a new tort theory to provide relief to litigants when evidence is intentionally or negligently destroyed by a party to the litigation. Trial judges are well equipped under the Montana Rules of Civil Procedure to address the problem as it occurs and deal with it accordingly, even entering default when the circumstances justify such relief.

Id. at ¶ 32.

Oliver also belies Quam's suggestion that trial courts do not have the power to address the situation where a subpoena is issued without notice to opposing parties. The fact that the Civil Rules do not explicitly catalog every potential rule violation is not a limitation on the courts' powers to control discovery and enforce discovery rules. The word "spoliation" is not in the Civil Rules, but this Court in *Oliver* recognized that trial courts have

ample powers, including entering a default, to deal with situations involving spoliation.

Quam has asserted that the remedies provided by the Montana Rules of Civil Procedure are not available when parties conduct discovery by unlawful means. This is nonsensical. A major purpose of the sanction provisions of the discovery rules and Civil Rule 45 is to deal with violations of the Civil Rules.

Indeed, Quam's counsel, perhaps unwittingly, admitted that there was no problem in this case that could not be addressed in the *Sebena* case itself. At the October 22 hearing, counsel made the following statement:

> I don't have any concern. I don't think Randy does either now that we see what's in Dr. Campbell's records, or any of the other records. I don't think we have any concern about the whole world marching into the Gallatin County Law and Justice Center and looking at Randy Quam's records.
>
> Our concern and the reason we filed this case is we don't want an adversarial attorney in a civil case to have unfettered access and that's what Mr. Halverson has done here. He's acquired for himself by misappropriating the subpoena powers, unfettered access to Randy Quam's medical records, depriving Randy of any opportunity to seek protections afforded by the rules.

[TR 51-52]

As the District Court stated, and as this Court has held in *Oliver*, "the Court finds that it is 'well equipped under the Montana Rules of Civil Procedure to address [discovery abuse] as it occurs . . .' and that recognition of a separate cause of action for Halverson's alleged violation of Rule 45(b)(1), M.R. Civ.P. is unnecessary." [CR 40 at 7, quoting *Oliver*, *supra*, at ¶ 32]

3. The District Court Correctly Ruled that Quam's Amended Complaint Fails to State a Cause of Action for Violation of His Constitutional Right to Privacy.

A. By its terms, Article II, § 10, of the Montana Constitution applies to state action.

Article II, § 10, of the Montana Constitution is succinct and states:

> **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Despite the clear reference to a compelling state interest, until 1985 this Court did not distinguish between private and public actions when interpreting § 10. See *State v. Hyem*, 193 Mont. 51, 630 P.2d 202 (1981), *overruled*, *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985).[4] Application

[4]Even prior to 1985, however, this Court never recognized a tort claim for damages against a private citizen for violation of another's constitutional right to privacy.

of the constitutional right to privacy under the Montana Constitution has been considered most commonly in conjunction with the guarantee in Article II, § 11 against unreasonable searches and seizures. Prior to *State v. Long*, in such cases as *State v. Hyem*, this Court had held that evidence obtained in an unreasonable search by either law enforcement or a private party could not be used to support criminal charges against that individual. In *Hyem*, this Court had held that the state constitutional prohibition against invasion of privacy applied to all persons, whether acting for the state or privately. *Hyem*, 193 Mont. at 57, 630 P.2d at 206. The dissent in *Hyem* pointed out that Montana was only one of ten states that had an express provision for privacy in its state constitution and the other states that had addressed the issue had held that the privacy protection applied only to state action. The dissent pointed out that historically constitutions have always been a means for people to address their government, and in the rare instances where the constitutional framework has embraced private conduct, it has explicitly so stated. For example, Article II, § 4 of the Montana Constitution provides in part, "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person . . .". The privacy section has no such reference to private conduct.

In *State v. Long*, this Court adopted the rationale of the three dissenters in *State v. Hyem*. The Court reviewed the legislative history of the constitutional convention and concluded that the drafters of the Constitution intended to proscribe state action only. The holding in *Long* is unequivocal: "we hold that the privacy section of the Montana Constitution contemplates privacy invasion by state action only." *Id.*, 216 Mont. at 71, 700 P.2d at 157.

Long has been frequently cited by this Court and has been followed on this precise point as recently as 2006 in *State v. Branam*, 2006 MT 300, ¶ 20, 334 Mont. 457, 148 P.3d 635. The U.S. District Court, District of Montana, has applied *Long* in the context of civil tort litigation. *Jimenez v. Liberty Northwest Ins. Co.*, 2007 WL 1378407 (D. Mont. May 7, 2007). *Jimenez* was a lawsuit against an insurance company for bad faith, intentional infliction of emotional distress, and violations of the constitutional rights of privacy and due process. Judge Molloy stated that "[Magistrate Judge Lynch] correctly relied on *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985), to conclude Plaintiffs have no right of action against another private party for violation of the right of privacy." *Jimenez* at *2 (see also Judge Lynch's discussion at *7).

B. Halverson is not a state actor nor acting under color of state law.

Quam appears to concede that *State v. Long* and its progeny preclude a claim against a private citizen for violation of one's constitutional right to privacy. Instead, Quam argues that Quam's constitutional claim survives, "because Halverson acted under color of state law when he misappropriated the subpoena powers granted by Rule 45, M.R.Civ.P." [Appellant's Brief at 18] Quam cites no authority from any jurisdiction that holds that an attorney, not employed by a governmental entity, acts under color of state law when signing and serving a subpoena. Indeed, the only attempt to supply any legal authority is an out of context quotation from the case of *National Collegiate Ass'n v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454 (1988). *Tarkanian* supports Halverson, not Quam. In that case, a state university basketball coach, facing discipline pursuant to NCAA recommendation, brought a § 1983 action against the NCAA. The state university had imposed the sanctions as a member of the NCAA. Although the sanctions themselves, since they were imposed by a state university, were state action, that did not turn the NCAA into a state actor and,

therefore, the NCAA could not be held liable for a violation of the coach's civil rights.

Quam also argues that a 1999 change to Civil Rule 45 that allowed an attorney to sign a subpoena somehow converted attorneys into state actors. Besides the absence of legal precedent supporting such a holding, this argument exalts form over substance. Prior to the change to Rule 45, an attorney obtained a subpoena from the clerk of court, but the subpoena was blank except for the signature. That is still an available procedure. Mont. R. Civ. P. 45(a)(3). Under either procedure, the attorney (or potentially a pro sé litigant under the original procedure) fills in the substance of the subpoena and is responsible for complying with the other requirements of Rule 45. Neither option is more or less likely to guarantee the opposing party receives a copy. The change in the rule promoted efficiency, it did not imbue attorneys with state powers.

If Quam's argument is carried to its logical conclusion, virtually every step an attorney takes pursuant to court rules would potentially turn a private attorney into a state actor. Indeed, state law generally allows members of all professions, once they become licensed, to conduct activities that non-members of the professions are not permitted. It has never been

held that a member of any profession, by exercising the rights and obligations of that profession, becomes a state actor by virtue of such enabling statues or regulations.

C. The cases cited by Quam are all readily distinguishable and often support Halverson.

The first case Halverson relies on is *Deserly v. Dep't. of Corrections*, 2000 MT 42, 298 Mont. 328, 995 P.2d 972. *Deserly* is a case involving the common law cause of action for invasion of privacy, not a constitutional privacy claim. The plaintiff in *Deserly*, a woman attempting to visit her inmate spouse at a state penitentiary, had been subject to a strip search. This Court affirmed a summary judgment dismissing her claim for invasion of privacy. When one contrasts the invasion of privacy of Mrs. Deserly, who was subject to a strip search, with Quam, who voluntarily attached his "private" medical records as an exhibit to his original Complaint, it is clear that Quam could not state a cause of action for a common law right of invasion of privacy. As stated in *Deserly*, he would need to allege conduct calculated "to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Id.* at ¶ 17.

Quam places substantial reliance on *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128. In that case, this Court recognized for the first time a claim for monetary damages for violation of the constitutional right to privacy. However, the defendants in that case were a county sheriff and county deputies. Indeed, it is clear that this Court, in creating a cause of action for damages, limited the cause of action to state actors. *Id.* at ¶ 77.

The cases of *State ex rel. Mapes v. District Court*, 250 Mont. 524, 822 P.2d 91 (1991), and *Simms v. District Court*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678, merely hold that a plaintiff's rights to privacy must be taken into consideration when deciding the proper scope of discovery into a plaintiff's medical or psychological condition.

Quam quotes dicta from three of this Court's cases that have no issues touching on a private citizen's liability for violation of the constitutional right of privacy. *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 981 P.2d 364 (challenge to statute regulating abortions); *Associated Press v. Dep't of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5 (ordering Department of Revenue to produce coal tax filings over right to privacy objections–Quam's quotation is from concurring opinion); *Commission on Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147

P.3d 200 (affirming permanent injunction, order of contempt, and dismissal of counterclaims in unauthorized practice of law matter and holding, *inter alia*, that citizens seeking legal advice from non-lawyer had no rights of privacy in such communications).

Finally, Quam cites *Klaus v. Edward D. Jones & Co.* His pinpoint cite is to a concurring opinion discussing the constitutional right to a jury and the constitutional right to access to the courts. *Klaus* concerned the enforceability of an arbitration clause in a securities brokerage agreement. Clearly, Quam has not been denied access to the courts as evidenced by this appeal.

D. Even if Article II, § 10 applied to conduct by private individuals, it would not change the result in this case.

As noted previously, no state has recognized a cause of action for damages against a private party for violation of the constitutional right of privacy. Montana, as recently as 2007, U.S. District Court for Montana, has directly held that no such claim is permitted. Even prior to *State v. Long*, when the invasion of a constitutional right to privacy by private parties could be used to exclude evidence in criminal cases, Montana never recognized a private cause of action for damages against a private party.

Instead, Montana recognizes a common law cause of action for invasion of privacy. See, e.g., *Deserly v. Dep't of Corrections*, *supra*, at ¶ 17; *Rucinsky v. Hentchel*, 266 Mont. 502, 505, 881 P.2d 616, 618 (1994); *Sistok v. Northwestern Tel. Systems, Inc.*, 189 Mont. 82, 92, 615 P.2d 176, 182 (1980). Plaintiff did not allege a cause of action for invasion of privacy, but even if he had, a summary review of the elements demonstrate that the current Amended Complaint fails to state a cause of action.

Furthermore, in this case, the only basis alleged for a violation of the constitutional right of privacy was that Halverson did not follow the procedures required by § 50-16-536(1), MCA, and Mont. R. Civ. P. 45. Since neither of the two foundations of a claim for violation of the constitutional right of privacy survived, the right to privacy claim also fails.

More fundamentally, Quam's privacy interest lies in the contents of the information, not the procedure. In this case, as a matter of law, established in the earlier *Sebena* case, Quam had waived his rights to privacy to this medical information. The Order attached as Appendix A establishes that these records were discoverable and Quam was independently ordered to produce them. [App. A at 12-13, 19] That case has

been dismissed (Appendix B), so the Court's Order in *Sebena* is *res judicata.*

Even without the Order, Quam voluntarily attached the records to the Complaint that he filed with the Court. By doing so, he made the records available to the public and waived any right to confidentiality or privacy in them. Removing any doubt about the lack of a privacy interest in the content of the medical records, at the October 22 hearing in this matter, his counsel stated:

> I don't have any concern. I don't think Randy does either now that we see what's in Dr. Campbell's records, or any of the other records. I don't think we have any concern about the whole world marching into the Gallatin County Law and Justice Center and looking at Randy Quam's records.

[TR 51]

Finally, there is no need for the court to address a constitutional tort in this case given the ample avenues of relief that are provided to address this situation. With respect to violations of Civil Rule 45, district court judges have ample powers and remedies to deal with the circumstances. Had there been a violation of § 50-16-536(1), MCA, there is already a statutory remedy provided by § 50-16-535, MCA. Finally, had there been a substantive invasion of Quam's privacy, instead of the mere alleged

procedural irregularities, there already exists a common law cause of action for invasion of privacy.

4. The District Court did not Deny Quam's Motion for Leave to File Amended Complaint, Because no such Motion was ever Filed.

It is at least ironic that Quam, who seeks to recover damages from the attorney representing his opponent for alleged procedural deficiencies in the course of litigation, argues that he is exempt from the requirements of the rules in this litigation. Quam faults the District Court for denying his motion to amend a complaint, but a review of the court register and the court file will demonstrate that Quam never filed a motion for leave to amend, never filed a proposed (second) amended complaint, and never filed a brief in support of his putative amended complaint.

Quam claims that a couple of sentences in Plaintiff's Response to Defendant's Motion to Dismiss, and Plaintiff's Motion for Summary Judgment satisfy the requirement that he file a motion. [CR 13 at 6 and 13-14] Assuming for argument's sake that a few sentences in a document designed to brief motions to dismiss and for summary judgment qualify as a motion for leave to file an amended complaint, there is no argument that Quam never filed a brief in support of the motion. Under Unif. Dist. Ct.

Rule 2(b), failure to file a supporting brief within five days of filing a motion is deemed an admission the motion is without merit.

At the October 22 hearing, the District Court confronted Quam's counsel on the lack of a motion, brief and proposed amended complaint. [TR 49] Counsel indicated he did not think he needed to, but he would be happy to do it and that it was a simple matter. [*Id.*] Nevertheless, no motion, no brief, and no proposed amended complaint were ever filed.

In the end, however, this issue is academic, if not moot. The change Quam wished to make in his amended complaint was to add an allegation that Halverson violated § 50-16-536(2), MCA (as opposed to or in addition to 536(1)). In granting Halverson's motion to dismiss, the District Court granted his motion with prejudice with respect to the Rule 45 issue and with respect to the violation of a constitutional right to privacy. However, the District Court dismissed Quam's claim under § 50-16-536 without prejudice. That means that Quam can still assert a claim under the statute if, within the confines of Rule 11, he can assert facts that will support it.

5. The District Court Correctly Denied Quam's Motion for Summary Judgment.

Although Quam labeled his motion in the title of his combined brief and motion as a "motion for summary judgment," in effect it was a motion for partial summary judgment based upon Quam's contention that there were no issues of fact that Halverson had violated Civil Rule 45 and § 50-16-536(2). At the October 22 hearing, Quam's counsel further refined his motion to request partial summary judgment on compliance with § 536(2):

> THE COURT: So, you're asking for partial summary judgment on the issue of liability.
>
> MR. STUDER: Well, a little more specifically than that. Generally speaking, that's correct. I think there would still be issues to resolve in the case. But specifically, what I am asking for is summary judgment that [Halverson] did not comply with 536(2) which requires him to identify--

[TR 25]

As has previously been discussed, Quam's amended complaint did not contain an allegation that Halverson violated § 50-16-536(2). Clearly, Quam was not entitled to summary judgment on a theory that was not before the Court.

Even if Quam had alleged a violation of § 50-16-536(2), the District Court still would have been required to deny the motion, because there was no competent evidence before the Court to establish whether or not Halverson complied with § 536(2). The only evidence that Quam relied on in support of his claim that the statute had been violated was a copy of the subpoena that he had attached to the original complaint. Assuming the subpoena was competent evidence, it does not demonstrate one way or the other compliance with § 536(2). The statute requires that:

> Service of compulsory process or discovery requests upon a health care provider must be accompanied by a written certification, signed by the person seeking to obtain health care information or by the person's authorized representative, identifying at least one subsection of 50-16-535 under which compulsory process or discovery is being sought.

[§ 50-16-536(2), MCA]

In other words, the statute requires a separate certification. There is no competent evidence in the record of this case whether or not a separate written certification accompanied the subpoena served on Dr. Campbell. Accordingly, the District Court had no evidence before it upon which it could grant a motion for summary judgment either way concerning

compliance with § 536(2), assuming that issue were validly before that Court.

CONCLUSION

For the reasons set forth above it is respectfully requested that this Court affirm the District Court on all points.

RESPECTFULLY SUBMITTED this 4th day of May, 2010.

MOORE, O'CONNELL & REFLING, P.C.

BY:_____
ALLAN H. BARIS, *Attorney for Defendant/Appellee*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this *Brief of Appellee* is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; WordPerfect 10.0; and has a word count of **6,844**, not averaging more than 218 words per page, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

Dated this 4th day of May, 2010.

_____
ALLAN H. BARIS, *Attorney for Defendant/Appellee*

CERTIFICATE OF MAILING

This is to certify that the above and foregoing was duly served upon counsel of record at his address by postage prepaid, this 4th day of May, 2010, as follows, to-wit:

Martin R. Studer, Esq.
638 Ferguson Ave., Suite 1
Bozeman, MT 59718
Attorneys for Plaintiff/Appellant

_____
ALLAN H. BARIS

APPENDIX TABLE OF CONTENTS